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No. 354

In the Supreme Court of the United States

OCTOBER TERM, 1964

GEORGE GEORGALIS, PETITIONER

v.

MORTIMER M. CAPLIN, Commissioner of Internal Revenue, DAVID C. ACHESON, United States Attorney for the District of Columbia, and ROBERT F. KENNEDY, Attorney General of the United States

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 384

GEORGE GENTILLI, PETITIONER

v.

MORTIMER M. CAPLIN, Commissioner of Internal Revenue, DAVID C. ACHESON, United States Attorney for the District of Columbia, and ROBERT F. KENNEDY, Attorney General of the United States

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OPINIONS BELOW

Neither the district court nor the court of appeals wrote an opinion.

JURISDICTION

The judgment of the court of appeals (Pet. 21) was entered on March 3, 1964. A petition for re-

hearing was denied on April 15, 1964. (Pet. 22.) By order of Mr. Justice Goldberg (Pet. 23), the time for filing a petition for certiorari was extended to August 13, 1964. The petition was filed on August 13, 1964. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTION PRESENTED

Whether error was committed when, after the district court granted the government's motion for summary judgment and dismissed the petitioner's complaint for the suppression of evidence alleged to have been unlawfully seized, the court of appeals affirmed the judgment while expressly preserving the petitioner's right to raise the same objections in any subsequent proceeding in which the government might attempt to use the evidence.

STATEMENT

The petitioner filed a complaint (R. 1-16)[1] in the United States District Court for the District of Columbia, naming as respondents the Commissioner of Internal Revenue, the Attorney General of the United States, and the United States Attorney for the District of Columbia. The complaint alleged that various documents (falling into three different categories, as described below) had been obtained in Italy from persons other than the petitioner, but allegedly in violation of the petitioner's rights under the

[1] "R." will be used to refer to the joint appendix filed in the court of appeals.

Fourth and Fifth Amendments. It asked that the respondents and their agents be enjoined from using "for any purpose and at any place" (R. 14) any of the evidence thus acquired, and that the documents be ordered returned to the persons in Italy from whom they had been obtained. After considering the pleadings, stipulations, depositions and affidavits filed in the case, the district court granted, without opinion, the government's motion for summary judgment and dismissed the complaint. (Pet. 20A.) The court of appeals affirmed without opinion, but expressly providing that this was "without prejudice" to "appellant's urging his objections to the use by the Government of the documents in suit in some subsequent appropriate proceeding. See *Reisman* v. *Caplin*, 375 U.S. 440 (1964)." (Pet. 21.)

The undisputed facts, as shown by the complaint, stipulations, affidavits and depositions, are as follows. The petitioner is, and at all relevant times was, a citizen of the United States living or resident in Milan, Italy. He was engaged in importing American electrical products into Italy, and, in connection with this activity, he was a stockholder in several Italian corporations. He also maintained his own bank account at a Milan bank One Tommaso Perenich was, from 1951 to 1954, the principal officer (the "sole administrator") of two of the Italian corporations, in one of which he was also a stockholder. (R. 5, 79-82, 117-118.) One corporation was put into liquidation in 1955, the liquidation being completed in 1958; the other was completely liquidated at the

end of 1954. (R. 345, 347.) Certain differences between Perenich and the petitioner were at one time the subject of an informal arbitration proceeding in Italy, in the course of which the parties exchanged written statements, including statements concerning the value of Perenich's stock in one of the corporations. (R. 7-8, 118, 120-121.)

In 1956, the Italian government requested an American customs agent, stationed in Milan, to assist it in an investigation of smuggling operations thought to be carried on by various Italian corporations, including the two corporations mentioned above and other Italian corporations in which the petitioner had an interest. (R. 190-192.) As a result of this request, the agent talked with Perenich, who came voluntarily to the agent's office and offered to give the agent all the documents and information he had concerning the corporations of which he had previously been sole administrator. (R. 192-193.) The agent found the documents of no use to his investigation but told Perenich that an Internal Revenue Agent (of the United States) would arrive during the next few months and that he might be interested in them. (R. 206.)

In May, 1957, an Internal Revenue Agent arrived in Milan and was told about Perenich. (R. 206-256.) Perenich came to see the agent at the United States consulate in Milan and volunteered the information that one of the Italian corporations (of which he had been the sole administrator) had paid more than $500,000 to the petitioner which, he believed

the petitioner had failed to report in his federal (United States) income tax returns. Perenich left and returned later the same day with copies of ledger sheets, invoices, checks, and other documents. He voluntarily left them at the consulate and later, with his consent, they were forwarded to Washington, D. C. (R. 256-259.)

The complaint alleged that the government obtained documentary evidence (corporate records or copies thereof and records or information from arbitration proceedings) from Perenich in violation of the petitioner's constitutional rights, since Perenich allegedly violated both Italian penal statutes forbidding a corporate officer to divulge information and implied contractual duties to keep in confidence any information obtained in the course of arbitration proceedings. The complaint did not allege that the petitioner owned any of the documents, although his Italian legal expert stated in an affidavit that, after a corporate liquidation, a stockholder becomes a proportionate or fractional owner of the remaining corporate assets. (R. 34.)

Aside from the corporate and arbitration records obtained from Perenich, the complaint alleged (R. 8) that the respondent Commissioner or the Attorney General obtained copies of checks and bank statements concerning the petitioner's accounts at a Milan bank, also allegedly by unlawful seizure (R. 5). In fact, the then Attorney General, in August, 1960, wrote to the Italian Minister of Justice requesting assistance in obtaining photocopies of the petitioner's Milan bank accounts and of checks drawn on

them, for use in such criminal prosecution as might be undertaken against the petitioner. (R. 380-381.) As a result, such copies were obtained and forwarded to Washington, D. C., by order of a Milan court. (R. 20, 316-318.) Subsequently, however, the court refused to order the production or delivery of additional bank records, and wrote an opinion in which it held that its original order was in error, since Italian law permits such discovery or production only at the request of foreign judicial authorities. (R. 316-333.) The court revoked its prior order, but only to the extent that it had not already been carried out. (R. 325, 332-333.)

No criminal proceedings have in fact been brought by the United States. Indeed, the petitioner, in his brief below (p. 10), informed the court that "it has been signified to appellant that there is now no criminal investigation pending against him; but this fact does not bind such representatives against reversion to their previous attitude."

ARGUMENT

Although the courts below have declined to rule on the constitutional claims which the petitioner invited them to consider, they have not precluded an adjudication in the event that the government should attempt to use against the petitioner any of the evidence which he alleges has been seized in derogation of his rights. Clearly, this disposition was proper and there is no occasion for review by this Court.

1. In the present case, any adjudication of the merits of the petitioner's allegations of unconstitutional search and seizure would have been premature and unnecessary, since the government might never attempt to use the evidence; if it should ever seek to do so, in any proceeding instituted against the petitioner, he may object and obtain an appealable ruling at that time. In short, he has an entirely adequate legal remedy. Cf. *Reisman* v. *Caplin*, 375 U.S. 440.

The petitioner incorrectly asserts (Pet. 11-12) that the judgment below is in conflict with *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385, *Burdeau* v. *McDowell*, 256 U.S. 465, and two court of appeals' decisions. None of the cited cases stands for the proposition that a federal court is obliged to grant equitable relief or to decide questions of alleged search and seizure on the merits, when the petitioner seeks no return of property but only a premature ruling on the admissibility of evidence, and when no likelihood of criminal prosecution appears.[2]

2. Although it is unnecessary to go further, we dispute the claim that the government violated the petitioner's rights under American law. Furthermore, even if our courts should undertake to reject evidence as a means of upholding foreign law, it seems clear that no law of Italy was violated, even unintentionally, by any federal representative or agent.

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[2] Even if the courts below had rendered an erroneous decision on the merits, it is doubtful whether the decision would be final and thus appealable, since the petitioner did not seek the return of any property to himself, or allege that he owned it. See *DiBella* v. *United States*, 369 U.S. 121, 131-132. But it appears unnecessary to consider that question here.

In accepting documents or copies of documents freely offered by Perenich, the Internal Revenue agent violated no rights protected by our Constitution or laws. See, *Burdeau* v. *McDowell*, 256 U.S. 465, 475. Here, on the undisputed facts, Perenich already had statements obtained in arbitration proceedings and copies of corporate records in his possession when he first spoke with a government agent in Milan; and there was, indeed, not even any evidence that he himself had obtained possession unlawfully.

At best, petitioner might contend that Perenich, in disclosing the information, violated an Italian penal statute (R. 31) punishing corporate managers who "without justified reason" disclose information with possible harmful results to the corporation (although here it would seem that there was justification and that in any event the corporations in question were either fully liquidated or in the process of liquidation). It does not follow, however, that the federal agent violated any Italian law in merely accepting the documents or information; nor did the petitioner's legal expert undertake (R. 29-36) to advance any such conclusion.

As to the documentary evidence concerning the petitioner's bank transactions, it should be sufficient to note that this evidence was obtained entirely through the order of an Italian court. The court later decided that the order was in error under Italian law, but it did not revoke the original order insofar as it had already been carried into execution.

The contention (Pet. 16-18) that the Attorney General or any other government representative or

agent violated the Income Tax Convention (Appendix below, A3-A5)[3] is plainly without merit. Article XVII (Appendix below, A4) provides that the "competent authorities" of each country "shall exchange" information "available under the respective taxation laws of the contracting States", but contains no negative provisions declaring that information may not be obtained in any other manner, *e.g.*, by voluntary transmittal from a private person, or by order of an Italian court, or otherwise.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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OCTOBER, 1964.

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[3] This reference is to the appendix to the petitioner's main brief in the court of appeals.

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